



The following constitutes the
Memorandum Decision of the Court.
Signed November 19, 2015



Roger L. Efremsky
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re:

Case No. 11-49803 RLE

Chapter 11

MORTGAGE FUND '08 LLC,

Debtor.

SUSAN L. UECKER,
Trustee of the Mortgage
Fund'08 Liquidating Trust,

Plaintiff,

v.

ROBERT L. MONTGOMERY,

Defendant.

Adv. Proc. No. 13-4190 RLE

**MEMORANDUM DECISION RE MOTIONS
FOR SUMMARY JUDGMENT**

1
2 **I. Introduction**

3 Before the court are cross-motions for summary judgment by
4 plaintiff Susan L. Uecker, the liquidating trustee appointed
5 under the confirmed plan of Mortgage Fund '08 LLC (the "Trustee"
6 and "MF08"), and defendant Robert L. Montgomery. This matter has
7 been fully briefed and argued.

8 The Trustee moves for summary judgment on the California
9 Civil Code §3439.04(a) constructive fraudulent transfer claim in
10 her first amended complaint. Montgomery moves for summary
11 judgment on the affirmative defenses asserted in his answer.

12 For the reasons explained below, the court grants summary
13 adjudication for Montgomery on his affirmative defense regarding
14 the effect of a release in a settlement agreement which
15 effectively moots the remaining summary judgment issues.

16
17 **II. Background**

18 These motions require a review of certain events in MF08's
19 chapter 11 case and the chapter 11 case of its affiliate, RE
20 Loans, LLC, which was filed in the Northern District of Texas
21 (Case no. 11-35865-BJH) ("REL").

22 The following facts are taken from the First Amended
23 Complaint (the "FAC") (Docket no. 30); Montgomery's Answer to the
24 FAC (Docket no. 31); the Trustee's Declaration and Statement of
25 Undisputed Facts (Docket nos. 44-2 and 44-5); Montgomery's
26 Declaration and Statement of Undisputed Facts (Docket nos. 46-1
27 and 46-2); and Montgomery's Request for Judicial Notice (Docket
28 no. 48).

For context, the court also takes judicial notice of MF08's
Plan and Disclosure Statement (MF08 Docket nos. 101-102); REL's
Disclosure Statement (REL Docket no. 843); REL's Plan (REL Docket
no. 905); the Declaration of James A. Weissenborn in Support of
Confirmation of the REL Plan (REL Docket no. 943); and the
Findings of Fact, Conclusions of Law, and Order Confirming the
REL Plan (the "REL Confirmation Order") (REL Docket no. 967).
Harris v. Cnty of Orange, 682 F.3d 1126, 1132 (9th Cir. 2012)
(court may take judicial notice of undisputed matters of public

1 record including documents on file in federal courts).

2
3 **A. The Bankruptcy Cases**

4 MF08's bankruptcy case was commenced as an involuntary
5 chapter 7 on September 12, 2011. MF08 Docket no. 1. The case was
6 converted to chapter 11 and an order for relief was entered on
7 September 28, 2011. MF08 Docket no. 11. The order approving its
8 Disclosure Statement and confirming its Plan was entered on
9 February 3, 2012 and the Trustee has been in place since that
10 time. MF08 Docket nos. 144-145.

11 REL commenced its chapter 11 case in the Northern District
12 of Texas on September 13, 2011. REL Docket no. 1. The REL
13 Confirmation Order was entered on June 26, 2012. As will be
14 explained below, MF08 filed a claim in the REL case which is the
15 genesis for these motions.

16
17 **B. Ownership and Operation of MF08 and REL**

18 Walter Ng and his sons Kelly Ng and Barney Ng owned,
19 managed, and controlled, directly or indirectly, MF08 and REL and
20 their related entities, B-4 Partners, LLC and Bar-K. Docket no.
21 30, FAC ¶8-10; Docket no. 31, Answer ¶8-10; Docket no. 44-5,
22 Uecker Decl. Ex. 5 (MF08's proof of claim filed in REL's case
23 (the "Proof of Claim"); REL Docket no. 843 (Disclosure
24 Statement). The FAC alleges that Walter and Kelly Ng formed REL
25 in January 2002.¹ REL made secured loans to real estate
26 developers. To raise money to fund these loans, it sold
27 unregistered securities to investors who became members of REL.
28 By the end of 2006, REL had raised over \$700 million, had over

23
24 ¹ The REL Disclosure Statement explains that REL was the
25 successor entity resulting from the merger of nine limited
26 partnerships into a limited liability company. B-4 Partners was
27 REL's sole manager from 2002 to REL's ch. 11 filing in 2011 and
28 REL's sole member from November 2007. From 2009, Walter, Kelly,
and Barney Ng were the members of B-4 Partners. Walter Ng was a
manager of B-4 Partners until he resigned when his bankruptcy
case was filed in May 2011. REL Docket no. 843, Disclosure
Statement at 18.

1 1,400 members and reported more than \$55 million cash on hand.
2 Docket no. 30, FAC ¶12; Docket no. 31, Answer ¶12; Docket no. 44-
3 10, Sugarman Report. See also, REL Disclosure Statement (REL
4 Docket no. 843); Declaration of James A. Weissenborn in support
5 of confirmation of REL Plan (REL Docket no. 943).

6 In early 2007, REL faced liquidity problems. It had been
7 advised by its attorneys that it could not raise more money from
8 new investors which meant it would then be unable to meet the
9 withdrawal demands of its old investors and meet its funding
10 commitments to its borrowers. Docket no. 30, FAC ¶13-14; Docket
11 no. 44-10, Sugarman Report at 3-5.

12 In November 2007, REL made its members into noteholders in
13 what is referred to as the "Exchange Transaction" and the
14 issuance of "Exchange Notes." REL Docket no. 843, Disclosure
15 Statement at 21-22. When it filed its bankruptcy case in
16 September 2011, REL had approximately 2,900 noteholders who were
17 owed approximately \$646 million (the "REL Noteholders"). REL
18 Docket no. 843, Disclosure Statement at 22-23. Montgomery is an
19 REL Noteholder.

20 In December 2007, the managers of REL created MF08. Docket
21 no. 30, FAC ¶16; Docket no. 44-10, Sugarman Report at 1. The
22 Mortgage Fund, LLC ("TMF") was MF08's sole member and manager;
23 Walter Ng and Kelly Ng were the sole members of TMF and thus
24 controlled MF08. Docket no. 30, FAC ¶8-10; Docket no. 31, Answer
25 ¶8-10. REL, MF08, TMF, B-4 Partners, and Bar-K all did business
26 from the same address in Lafayette, California. Docket no. 30,
27 FAC ¶9; Docket no. 31, Answer ¶9.

28 MF08's stated purpose was to make secured loans to real
estate developers. Docket no. 30, FAC ¶16; Docket no. 44-10,
Sugarman Report at 1. MF08 did business much as REL did after the
Exchange Transaction. As of its petition date, MF08 had
approximately 572 noteholders who were owed approximately \$80
million and held a real estate portfolio valued at approximately
\$72 million. MF08 Docket no. 101, Disclosure Statement at 1-8.

C. MF08's \$66 Million Proof of Claim in the REL Case

The Trustee's declaration states that "[p]rior to my

1 appointment as trustee, MF08 asserted that MF08 transferred
2 \$66,226,496 to REL and that REL was liable to MF08 in this
3 amount. I continued to assert this claim after my appointment."
4 Docket no. 44-5, Uecker Dec. ¶13-14, Ex. 5 (Proof of Claim). The
5 Proof of Claim describes the MF08 ownership structure as noted
6 above. It asserts:

7 [B]etween December 4, 2007, and February 4, 2009, the Ngs
8 caused the aggregate sum of \$66,226,496 to be transferred
9 from MF08's bank accounts to [REL] (the "Cash Transfers").
10 The Cash Transfers were made either (1) directly to [REL],
11 (2) indirectly through [TMF] or Bar-K, or (3) to [REL's]
12 borrowers to enable such borrowers to service or repay loans
13 extended to them by [REL].

14 Docket no. 44-5, Uecker Dec. Ex. 5 (emphasis added).

15 The Proof of Claim seeks the recovery of the Cash Transfers
16 based on the theory that MF08 made them with the actual intent to
17 hinder, delay or defraud entities to whom MF08 was or became
18 indebted. It includes a list of each of the Cash Transfers that
19 totals \$66,226,496.

20 **D. MF08 Settlement with REL and Confirmation of the REL Plan**

21 REL informally objected to MF08's Proof of Claim. Docket no.
22 44-5, Uecker Dec. ¶14. In April 2012, the principal stakeholders
23 in the REL case - REL, Wells Fargo Capital Finance (REL's secured
24 lender), and the official REL Noteholders' Committee
25 (representing Montgomery's interests as a REL Noteholder) -
26 participated in a judicial mediation. They then reached a
27 settlement of the outstanding issues regarding the validity and
28 priority of MF08's Proof of Claim, along with related issues
which allowed REL to proceed to confirmation of its Plan. Docket
no. 44-5, Uecker Dec. ¶14-15.²

REL filed a motion to obtain court approval of the
settlement. Docket no. 48, RJN Ex. 10 (Motion for Approval of
Settlement, REL Docket no. 907 (the "Motion")). Attached to the
Motion is an unsigned copy of the settlement agreement between

² The REL plan confirmation process was underway in April
2012; the first version of its plan and disclosure statement were
filed February 1, 2012. REL Docket nos. 465-466.

1 REL and MF08 (the "Settlement Agreement"). Docket no. 48, RJN Ex.
2 9 (Settlement Agreement), REL Docket no. 907-1 (Settlement
3 Agreement).

4 The Motion describes the Proof of Claim and MF08's
5 fraudulent transfer theory. The Motion defines the "REL
6 Transfers" as the transfer of \$66 million made between December
7 2007 and "approximately August of 2008"³ and the commingling by
8 REL in its general account with other REL funds. Docket no. 48,
9 RJN Ex. 10 (Motion ¶12-13). MF08 contended that "if it can trace
10 the funds that it transferred to REL from REL to any given [REL]
11 Noteholder, MF08 might have the right to pursue recovery from
12 that [REL] Noteholder as a subsequent transferee pursuant to
13 Bankruptcy Code §550(b)." These are defined as the "MF08
14 Potential Avoidance Actions." Docket no. 48, RJN Ex. 10 (Motion
15 ¶14). The Motion then describes the response by REL and the REL
16 Noteholders Committee:

17 [REL] and the Noteholders Committee contend that Noteholders
18 who received the REL Transfers who were *not insiders* of
19 [REL] cannot be liable to MF08 because (a) it is not
20 possible to trace the dollars received from MF08 to any
21 specific REL Transfer or transferee; and (b) each [REL]
22 Noteholder that received an REL Transfer, with the *possible*
23 *exception of insiders* of [REL], received any such REL
24 Transfer on account of a debt payable by [REL] for value, in
25 good faith, and without knowledge of the voidability of the
26 transfer from MF08 to [REL] (even assuming that transfer is
27 avoidable) and, therefore, would be shielded from liability
28 pursuant to Bankruptcy Code §550(b).

Docket no. 48, RJN Ex. 10 (Motion ¶15) (emphasis added).

The Motion then describes the "prior plan compromise" which
had been negotiated by REL and the REL Noteholders' Committee and

³ The court notes that in the Proof of Claim, the time
period for the transfer of \$66 million is December 4, 2007 to
February 4, 2009 - not August 2008. Also, §2.01 of the Settlement
Agreement says the \$66 million was transferred from "December
2007 through 2008" and §2.04 defines the REL Transfers as having
been made "between December 2007 through approximately August
2008." The FAC says the time period for the transfer to
Montgomery is July 22, 2008 to October 8, 2008. There is no
explanation for these differing dates. It is unclear if there is
any significance to these differences.

1 the change to it which was now required by this proposed
2 settlement with MF08. Docket no. 48, RJN Ex. 10 (Motion ¶16).
3 Essentially, the prior plan compromise provided that if the REL
4 Noteholders voted to accept the plan, the REL Noteholders' lien
5 on REL assets would be released, they would share pro rata with
6 holders of general unsecured claims and their claims would not be
7 "subordinated or challenged," but each REL Noteholder's claim
8 would be reduced by 50% of any cash received after the November
9 2007 Exchange Transaction through the REL petition date. Docket
10 no. 48, RJN Ex. 10 (Motion ¶16).

11 The proposed deal with MF08 made one change to the "prior
12 plan compromise." Instead of the REL Noteholders sharing pro rata
13 with the general unsecured creditors, the first \$5 million to be
14 distributed was to go to general unsecured creditors before the
15 REL Noteholders would share pro rata. This change increased the
16 distribution to general unsecured creditors - primarily
17 benefitting MF08 as the largest such creditor - and reduced the
18 distribution to REL Noteholders through reallocation of the first
19 \$5 million. In exchange for this "enhancement," MF08 agreed to
20 vote its \$66 million claim in favor of the plan.⁴ Docket no. 48,
21 RJN Ex. 10 (Motion ¶17). In addition, the Motion states that in
22 exchange, MF08 would waive the right to pursue all MF08 Potential
23 Avoidance Actions against REL Noteholders, and MF08 would be
24 appointed to the trust oversight committee of the liquidating
25 trust to be created under the REL Plan. Docket no. 48, RJN Ex. 10
26 (Motion ¶3 (summarizing terms of agreement resolving objection to
27 MF08's Proof of Claim and the relative treatment of all unsecured
28 claims and the REL Noteholder claims)).

1 The Motion explained that absent this agreement, the parties
2 would be forced to litigate the merits of the MF08 Proof of
3 Claim, the merits of the final plan compromise, the relative
4 priorities and rights as between the holders of general unsecured
5 claims and the REL Noteholders, and the merits of the MF08

6 ⁴ The REL Confirmation Order describes MF08 as REL's largest
7 unsecured creditor. REL Docket no. 967, REL Confirmation Order
8 ¶M.

1 Potential Avoidance Actions. This was an unattractive proposition
2 because it would "consume substantial cash that would otherwise
3 be distributable to REL Noteholders and MF08's creditors." Docket
no. 48, RJN Ex. 10 (Motion ¶23-25).

4 The Motion also noted that many REL Noteholders were also
5 investors in MF08, and paying the professionals to redistribute
6 the limited funds available as between MF08 and REL would reduce
7 the total amount received by all creditors. Litigating MF08's
8 Potential Avoidance Actions would also likely be complex and
9 could require expensive efforts to trace funds, and every dollar
10 spent on professionals would reduce the amount available for
11 distribution to creditors. The modified plan eliminated these
12 issues and was supported by all stakeholders, including the
committee of MF08's noteholders. Docket no. 48, RJN Ex. 10
(Motion ¶23-25).

13 On June 18, 2012, the REL bankruptcy court held a hearing on
14 the Motion and granted it. Docket no. 48, RJN Ex. 11 (Order on
15 Motion). As a result, MF08 obtained allowance of its \$66 million
16 claim, the \$5 million preferred payment, and a position on the
17 REL trust oversight committee.⁵ The REL Noteholders agreed to
18 reduce the allowed amount of their claims by 50% of what they had
19 been paid between the November 2007 Exchange Transaction and
20 REL's September 2011 petition date in exchange for a release from
potential fraudulent transfer actions. With the REL Noteholders'
and MF08's support, REL obtained a clear path to confirmation of
its Plan.

21 **E. The Settlement Agreement**

22 The Settlement Agreement is an exhibit to the Motion. Of
23 particular concern for these summary judgment motions are the
24 following sections. The recitals in §2 of the Settlement
25 Agreement provide:

26
27 ⁵ According to the Trustee's Third Quarter 2015 Operating
28 Report, the MF08 estate has been paid \$1.591 million by the REL
estate as of April 2015. MF08 Docket no. 824 (Operating Report).

1 2.01 MF08 transferred cash in an amount equal to \$66,226,496
2 to [REL] during the period from December of 2007 and through
3 2008.

4 2.02 MF08 contends that [REL] is liable to MF08 for the
5 monies received on various theories, including without
6 limitation based upon the contention that the transfers may
7 have constituted fraudulent transfers.

8 2.03 During the time period from December of 2007 through
9 approximately August of 2008, [REL] received cash and
10 deposited that cash into its general account from multiple
11 sources, including without limitation (a) the transfers from
12 MF08 described in 2.01, above, (b) payoffs by [REL's]
13 borrowers of principal and interest, (c) sales of assets,
14 and (d) advances by Wells Fargo Capital Finance, LLC ("Wells
15 Fargo").

16 2.04 During the time period from December of 2007 through
17 approximately August of 2008, [REL] made payments out of its
18 general account to many different parties, including without
19 limitation, payments to various creditors, including without
20 limitation the holders of Exchange Notes issued to [REL's]
21 Noteholders (the "REL Transfers").

22 2.05 MF08 contends that if it could trace the funds that it
23 transferred to [REL] as described in Paragraph 2.01 from
24 [REL] to the holders of Exchange Notes, MF08 might have the
25 right to pursue recovery from the holders of Exchange Notes
26 as "subsequent transferees" pursuant to Bankruptcy Code §
27 550(d) [sic]. [REL] contends that holders of Exchange Notes
28 who received the REL Transfers cannot be liable to MF08
because (a) it is not possible to trace the dollars received
from MF08 to any specific REL Transfer; and (b) each holder
of an Exchange Note that received an REL Transfer, with the
possible exception of insiders who may have received an REL
Transfer, received any such REL Transfer on account of a
debt payable by [REL] for value, in good faith, and without
knowledge of the voidability of the transfer from MF08 to
[REL] (even assuming the transfer is avoidable) and,
therefore, would be shielded from liability pursuant to
Bankruptcy Code §550(b).

2.06 MF08's potential right to assert claims against holders
of Exchange Notes that received REL Transfers shall be
referred to herein as "MF08's Potential Avoidance Actions".

Sections 3.01 - 3.03 dealt with the allowance of MF08's
claim in the REL case. In short, if REL's Plan was confirmed and

1 the plan compromise was approved, MF08's Proof of Claim "shall be
2 allowed" in the amount of \$66,226,496. Sections 4.01 - 4.02 dealt
3 with waiver of the right to pursue MF08 Potential Avoidance
Actions:

4 4.01 If the MF08 Claim is Allowed pursuant to Paragraph 3
5 above, MF08 waives the right to pursue any MF08 Potential
6 Avoidance Actions; provided, however, that this Agreement
7 shall not limit or restrict the right of MF08 to bring any
8 action against any third party, including any manager,
member, insider or professional of MF08. This provision
shall be void and of no further force or effect if the MF08
Claim is not Allowed pursuant to Paragraph 3, above.

9 4.02 With respect to the claims released herein, MF08
10 acknowledges that it has been advised by its attorneys
11 concerning, and is familiar with, the California Civil Code
12 Section 1542 and it expressly waives any and all rights
13 under California Civil Code Section 1542 and under any other
federal or state statute or law of similar effect with
respect to the claims released herein. Section 1542 of the
California Civil Code provides as follows:

14 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE**
15 **CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER**
16 **FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN**
BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER
SETTLEMENT WITH THE DEBTOR.

17 Docket no. 48, RJN Ex. 9-10 (Motion and Settlement Agreement)
18 (emphasis in original).

19 **F. The Transfer to Montgomery**

20 The Trustee declares that shortly after she was appointed as
21 Trustee in February 2012, she was provided all the books and
22 records maintained by MF08, including the bank statements and
23 general ledgers for both MF08 and TMF.⁶ Docket no. 44-5, Uecker

24 ⁶ Upon MF08's filing in September 2011, the Ngs were removed
25 and new management and their professionals "thoroughly reviewed
26 MF08's books and records with a view to tracing all transfers of
27 cash made by MF08 during the history of its existence." MF08
Docket no. 101, Disclosure Statement at 5. The court assumes this
28 analysis was shared with the Trustee upon her appointment in
February 2012 and that she possessed this information at the time
she participated in the mediation in April 2012.

1 Dec. ¶3.

2 Between approximately July 22, 2008 and October 8, 2008, the
3 managers of REL made a series of transfers from MF08 to TMF and
4 these funds were used to pay REL investors to keep the REL "Ponzi
5 scheme" going. Docket no. 30, FAC ¶16-17. The transfer to
6 Montgomery is allegedly one of these transfers. Docket no. 30,
7 FAC ¶18.⁷ The FAC alleges that MF08 was insolvent at the time
8 these transfers were made and they were made with actual or
9 constructively fraudulent intent and no value was given in
10 exchange. Docket no. 30, FAC ¶17-21. (The Trustee's expert also
states that MF08 was insolvent from its inception onwards. Docket
no. 44-7, Sugarman Dec. ¶11. Montgomery does not dispute that
MF08 was insolvent.)

11 Montgomery had \$924,887 invested in REL as of December 31,
12 2007. Docket no. 46-2, Montgomery Dec. ¶4, Ex. 1, Ex. 5. On July
13 1, 2008, at Montgomery's request, REL transferred \$150,000 to
14 Montgomery. On July 31, 2008, an additional \$150,000 was
15 transferred to Montgomery. These transfers went directly to
16 Montgomery's Individual Retirement Account at Wells Fargo Bank.
17 Docket no. 31, Answer Ex. B (9/30/08 REL investor portfolio
18 account statement - each \$150,000 transfer described as "sold
19 shares" in REL); Docket no. 46-2, Montgomery Dec. Ex. 1 (3/18/10
20 REL investor portfolio account statement - each transfer
21 described as "note prepay"); Docket no. 46-2, Montgomery Dec. Ex.
22 3 (1/1/08-12/31/08 Wells Fargo Bank IRA statement - each transfer
23 described as "liquidation RE Loans").⁸ The Trustee seeks to
24 recover this second \$150,000 transfer because it was made by a
check written on TMF's bank account.

25 In support of her motion, the Trustee offers the July 2008
26 bank statements for MF08 and TMF. Docket no. 44-5, Uecker Dec.
27 Ex. 1-2. In support of his motion and in opposition to the

28 ⁷ In September 2013, the Trustee commenced 16 other
adversary proceedings against REL Noteholders with the same basic
allegations as made in this case. Eight of these are still
pending.

⁸ There is no explanation for this varying terminology.

1 Trustee's, Montgomery offers REL's July 2008 bank statement.
2 Docket no. 48, RJN, Ex. 12.⁹

3 The bank documents offered by both the Trustee and
4 Montgomery show the following sequence of events:

5 1. On July 21, 2008, REL transferred \$528,791 to MF08.
6 Docket no. 48, RJN Ex. 12 at 2 of 6 (REL bank statement); Docket
7 no. 44-6, Uecker Dec. Ex. 1 at 1 of 3 (MF08 bank statement).

8 2. On July 21, 2008, MF08 transferred \$528,791 to TMF.
9 Docket no. 44-6, Uecker Dec. Ex. 1 at 2 of 3 (MF08 bank
10 statement), Ex. 2 at 1 of 2 (TMF bank statement).

11 3. On July 23, 2008, TMF wrote check no. 1020 for \$150,000
12 made payable to "WFB IRA Services fbo Montgomery." Docket no. 44-
13 6, Uecker Dec. Ex. 3 (\$150,000 check).

14 4. On July 25, 2008, REL transferred \$447,566 to MF08.
15 Docket no. 48, RJN Ex. 12 at 5 of 6 (REL bank statement), Docket
16 no. 44-6, Uecker Dec. Ex. 1 at 2 of 3 (MF08 bank statement).

17 5. On July 28, 2008, MF08 transferred \$447,566 to TMF.
18 Docket no. 44-6, Uecker Dec. Ex. 1 at 2 of 3 (MF08 bank
19 statement) Ex. 2 at 1 of 2 (TMF bank statement).

20 6. On July 28, 2008, TMF's bank honored the \$150,000 check
21 to Montgomery. Docket no. 44-6, Uecker Dec. Ex. 2 at 2 of 2 (TMF
22 bank statement). Montgomery's IRA statement shows it had received
23 this \$150,000 as of July 31, 2008. Docket no. 46-2, Montgomery
24 Dec. Ex. 3.

25 The Trustee points out that the only deposit into the TMF
26 account between July 1 and July 23, 2008 was the \$528,791 deposit
27 and it raised the balance in this account to \$571,022. However,
28 the July 2008 TMF bank statement also shows that \$447,566 was
deposited on July 28, 2008. The TMF bank statement also shows
there were only two withdrawals from the TMF account between July
21 and July 28 - the \$150,000 check to Montgomery and a \$400,000

25 ⁹ The Trustee has objected to the admission of the REL bank
26 statement on the grounds it is hearsay. The Trustee is correct.
27 However, the Trustee appears to waive this objection by
28 responding that the payments shown on this bank statement are
shown on MF08's records as payments by REL of accrued interest to
MF08. Docket no. 52-1, Uecker Dec. ¶7-8.

1 wire transfer to another REL Noteholder who has settled his
2 fraudulent transfer case brought by the Trustee.

3 The Trustee says MF08's books and records do not show that
4 MF08's transfer of \$528,791 to TMF was in payment of a debt owed
5 by MF08 to TMF and do not show that MF08 received anything from
6 TMF in exchange for this transfer. She also states that TMF's
7 records do not reflect that the transfer was in payment of a debt
8 owed by MF08 to TMF or that TMF transferred any assets or
9 property to MF08 in exchange for the funds. Docket no. 44-5,
10 Uecker Dec. ¶9. Montgomery does not challenge this.

11 It is undisputed that in July 2008, REL transferred \$528,791
12 to MF08 and then transferred \$447,566 to MF08 and MF08
13 immediately transferred these exact amounts to TMF.¹⁰ It is also
14 undisputed that when sufficient funds were in the TMF account,
15 TMF's bank honored the check to Montgomery and it was credited to
16 his IRA on July 31, 2008.

17 The Trustee states that the \$66 million in the Proof of
18 Claim does not include the amounts that MF08 transferred to TMF
19 which were then used to pay REL Noteholders such as Montgomery.
20 Docket no. 44-5, Uecker Dec. ¶13-14. The only support for this
21 assertion is the Trustee's own statement.¹¹ The time period for
22 the Cash Transfers includes the date of the transfer to
23 Montgomery. At a minimum, and without more support, this suggests
24 that some of the funds transferred from MF08 to REL may

25 ¹⁰ The Trustee contends that the transfers of \$528,791 and
26 \$447,566 were for "payment of accrued interest" on two loans sold
27 by REL to MF08 in April 2008 but with the sales made effective as
28 of December 2007. Docket no. 52-1, Uecker Dec., ¶6-9. However,
according to the Trustee's expert, "[a]s of March 2008, the
borrowers on these loans had stopped paying interest and the
loans were in default." Docket no. 44-7, Sugarman Dec., ¶9-10.
The T&J Saucepan loan was in default at the time of transfer to
MF08; the Peachtree loan was delinquent 30 days as of June 30,
2008. Docket no. 44-10, Sugarman Report at 12-14. Thus, it is
unclear if interest payments were in fact made by REL's borrowers
or if these payments were fictional.

¹¹ At oral argument Trustee's counsel stated there was a
basis for the assertion but did not specify what it was.

1 eventually have made their way to him and this \$150,000 transfer
2 may be included in the total in the Proof of Claim.

3 **III. Discussion**

4 **A. Summary Judgment Standard**

5 A court should grant summary judgment if there is no genuine
6 dispute as to any material fact and the moving party is entitled
7 to judgment as a matter of law. Fed.R.Civ.P. 56(a), applicable
8 here by Fed.R.Bankr.P. 7056. Anderson v. Liberty Lobby, Inc., 477
9 U.S. 242, 247-78 (1986). Material facts are those that may affect
10 the outcome of the case. Anderson, at 248. A dispute about a
11 material fact is genuine if there is sufficient evidence for a
reasonable jury to return a verdict for the non-moving party. Id.
at 248-49.

12 A party moving for summary judgment has the initial burden
13 of informing the court of the basis for the motion and
14 identifying those portions of the pleadings, depositions, answers
15 to interrogatories, admissions or affidavits that demonstrate the
16 absence of a triable issue of material fact. Celotex Corp. v.
17 Catrett, 477 U.S. 317, 323 (1986). To meet its burden, the moving
18 party must either produce evidence negating an essential element
19 of the nonmoving party's claim or defense or show that the
20 nonmoving party does not have enough evidence of an essential
element to carry its ultimate burden of persuasion at trial.
Nissan Fire & Marine Ins. Co. Ltd. v. Fritz Companies, Inc., 210
F.3d 1099, 1102 (9th Cir. 2000).

21 If the moving party meets its initial burden, the burden
22 shifts to the non-moving party, which must go beyond the
23 pleadings and submit admissible evidence supporting its claims or
24 defenses and showing a genuine issue for trial. Celotex, 477 U.S.
25 at 324; Nissan Fire, 210 F.3d at 1103. If the non-moving party
26 does not produce evidence to show a genuine issue of material
fact, the moving party is entitled to summary judgment. Celotex,
477 U.S. at 323.

27 In ruling on a motion for summary judgment, inferences drawn
28 from the underlying facts are viewed in the light most favorable

1 to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith
2 Radio Corp., 475 U.S. 574, 587 (1986).

3 Montgomery has the burden of proving he is entitled to
4 summary judgment on his affirmative defenses regarding the
5 Settlement Agreement. Fed.R.Civ.P. 56(a). A court may grant
6 summary judgment regarding the interpretation of ambiguous
7 language in a contract if the non-moving party fails to point to
8 any relevant extrinsic evidence supporting that party's
9 interpretation of the language. Compagnie Financiere de CIC et de
10 L'Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith,
11 Inc., 232 F.3d 153 (2nd Cir. 2000).

12 The Trustee has the burden of proof on the elements of her
13 fraudulent transfer claim. To avoid summary judgment in her
14 favor, Montgomery must identify specific triable facts. Southern
15 California Gas Co. v. City of Santa Ana, 336 F.3d 885 (9th Cir.
16 2003).

17 **B. The Trustee's Summary Judgment Argument**

18 The Trustee argues that she has shown that MF08 is entitled
19 to summary judgment on its Civil Code §3439.04(a)(2)(A)
20 constructive fraudulent transfer claim (applicable here pursuant
21 to Bankruptcy Code §544(b)).¹²

22 She asserts that the undisputed facts show MF08 is entitled
23 to avoid the transfer of \$528,791 from MF08 to TMF and may
24 recover \$150,000 of it from Montgomery as either the initial
25 transferee or the immediate transferee of the initial transferee
26 as Bankruptcy Code §550(a) permits. Docket no. 44, Memorandum at
27 10-11. She acknowledges that TMF, MF08, and REL were all controlled by
28 Walter and Kelly Ng which would make Montgomery the initial
transferee rather than a subsequent transferee. However, she

¹² She also argues she has shown she is entitled to summary judgment on a Civil Code §3439.05 claim but there is no such claim pled in the FAC.

1 claims this does not change the outcome.¹³

2 The Trustee also argues that she has shown she is entitled
3 to summary judgment disposing of Montgomery's affirmative defense
4 under Bankruptcy Code §550(b) because there is no evidence that
5 he gave value to TMF or MF08¹⁴ and his interpretation of the
6 Settlement Agreement is simply incorrect. Docket no. 44,
7 Memorandum at 12-17.

8 In opposition to the Trustee's motion, Montgomery argues
9 that he is, in fact, the recipient of a REL Transfer based on the
10 series of transfers that ended with the TMF check to his IRA.
11 Under that theory, he argues that the Settlement Agreement covers
12 this transfer to him. He also contends that MF08's waiver of the
13 protections of Civil Code §1542 in the Settlement Agreement also
14 protects him. Relying on In re California Litfunding, 360 B.R.
15 310 (Bankr. C.D. Cal. 2007), Montgomery also contends that the
16 Trustee's lawsuit is an impermissible collateral attack on the
17 REL Confirmation Order. Docket no. 54, Memorandum.

18 In reply, the Trustee argues that Montgomery has not offered
19 any evidence to defeat entry of summary judgment on her
20 fraudulent transfer case. He has presented no evidence showing
21 that MF08 did not have dominion over the funds that may have been
22 transferred to it by REL. Whether REL was the source of the funds
23 does not matter because there is no evidence that MF08's right to
24 use the funds was restricted in any way. Adams v. Anderson (In re
25 Superior Stamp & Coin Co.), 223 F.3d 1004, 1009 (9th Cir. 2000)

21 ¹³ Civil Code §3439.01(a)(asset means property of debtor)
22 and (h) (property means anything that may be subject of
23 ownership); Bankruptcy Code §548(a)(1) (a trustee may avoid a
24 transfer of an interest of the debtor in property); In re Bullion
25 Reserve of North America, 944 F.2d 544, 548 (9th Cir. 1991)
26 (discussing requirement of dominion over money for transferee
27 status); In re Incomnet, Inc., 463 F.3d. 1064 (9th Cir. 2006)
28 (discussing definition of transferee).

26 ¹⁴ Because her claim is based on Civil Code §3439.04 and
27 §3439.07, the defenses under Civil Code §3439.08 are also
28 relevant. In re JTS Corporation (Decker v. Tramiel), 617 F.3d
1102 (9th Cir. 2010).

1 (discussing earmarking doctrine for preference analysis, where
2 bank advanced funds to debtor on condition they be used for
3 paying a specific creditor, debtor did not have control over the
4 funds, earmarking defense applied). As to the release issue, she
5 argues that Montgomery ignores the plain language of the
6 Settlement Agreement and offers no evidence on which the trier of
fact could find that the Settlement Agreement was intended to
release this claim. Docket no. 60, Reply Memorandum.

7 8 **C. Montgomery's Summary Judgment Argument**

9 Montgomery moves for summary judgment on his affirmative
10 defenses. He makes the same arguments made in opposition to the
11 Trustee's motion, i.e., that the Settlement Agreement covers this
12 claim against him, that he is a good faith transferee for value,
and that the evidence shows he was in fact the recipient of a REL
Transfer. Docket no. 49, Memorandum.

13 In opposition to Montgomery's motion, the Trustee argues
14 Montgomery has offered no evidence to defeat her entitlement to
15 summary judgment on her fraudulent transfer case and repeats the
16 arguments about the interpretation of the Settlement Agreement.
Docket no. 52, Opposition Memorandum.¹⁵

17 In reply, Montgomery argues it defies credulity for the
18 Trustee to argue she was unaware of the transfers from MF08 to
19 TMF because she had all relevant records at the time she signed
20 the Settlement Agreement. The waiver of the protections of Civil
21 Code §1542 prevent her from suing him. Docket no. 61, Reply
Memorandum.

22 **D. Discussion of the Release Issues**

23 The essential question raised by Montgomery's motion for
24 summary judgment on his affirmative defense regarding the
25 Settlement Agreement is whether the Settlement Agreement between

26 ¹⁵ The Trustee also objects to many of the so-called
27 undisputed facts in Montgomery's motion. Docket no. 52-3,
28 Statement of Disputed Facts in Opposition. The Trustee is largely
correct.

1 REL and MF08 released this fraudulent transfer claim against him.
2 Was he released as a subsequent transferee because he was paid by
3 REL using untraceable MF08 money, or was he excluded from this
4 released class because he was paid by TMF, MF08's owner and
5 manager, with funds traceable to, or originating with and under
6 the dominion of, MF08? Was Montgomery released because MF08
7 waived the right to pursue unknown or unsuspected claims that it
8 had at the time the Settlement Agreement was signed? Or is he a
9 third party the Trustee reserved the right to sue?

10 The Trustee argues that the Settlement Agreement released
11 only a narrow class of claims - claims against REL Noteholders
12 who were paid by REL - and §4.01 preserves MF08's right to bring
13 this action against Montgomery as "any third party." The Trustee
14 also insists that the language of the Settlement Agreement does
15 not support a finding that the intent of the parties was to
16 release unknown claims. Docket no. 44, Trustee's Memorandum at
17 17. On the other hand, Montgomery argues that the language of the
18 Settlement Agreement clearly supports his position that the
19 intent was to release this action against him. He relies on the
20 language in the Settlement Agreement, and on the communications
21 he received from the Noteholders Committee urging a vote in favor
22 of the REL Plan. Docket no. 54, Montgomery's Memorandum at 9;
23 Docket no. 46-2, Montgomery Dec. Ex. 8 (Committee's letter
24 explaining REL Plan).¹⁶ Thus, they clearly disagree as to the
25 Settlement Agreement's meaning, suggesting, at the very least,
26 that it *may be* ambiguous.

27 ¹⁶ The Trustee argues that the court should ignore the REL
28 Noteholders' Committee's letter because it is the uncommunicated
subjective intent of the Committee which is irrelevant in this
context. Docket no. 52, Opposition at 22. The letter, in
substantially the same form, was approved by the REL court to be
delivered to the REL Noteholders with the ballot for voting on
the REL Plan. REL Docket no. 832 (proposed solicitation letter).
It was obviously communicated to the REL Noteholders. The REL
Noteholders' Committee's counsel's task was to explain the
consequences of voting for or against confirmation. It is of
limited utility here and the court merely notes the inaccuracy of
the Trustee's characterization of it as "uncommunicated."

1 **1. Is the Settlement Agreement Ambiguous?**

2 If the Settlement Agreement is reasonably susceptible to
3 more than one interpretation, it is ambiguous. Winet v. Price, 4
4 Cal.App.4th 1159, 1165-66 (1992). To determine whether it is
5 ambiguous, the court provisionally accepts extrinsic evidence
6 regarding competing interpretations of the Agreement. Pacific Gas
7 & E. Co. v. G.W. Thomas Drayage & etc. Co., 69 Cal.2d 33, 39-40
8 (1968) (rational interpretation requires at least a preliminary
9 consideration of all credible evidence offered to prove the
10 intention of the parties).

11 Montgomery requests that the court take judicial notice of
12 certain documents that are, in context, extrinsic evidence. As
13 explained in Winet v. Price:

14 The decision to admit parol evidence involves a two-step
15 process. First, the court provisionally receives (without
16 actually admitting) all credible evidence concerning the
17 parties' intentions to determine "ambiguity," i.e., whether
18 the language is "reasonably susceptible" to the
19 interpretation urged by a party. If in light of the
20 extrinsic evidence the court decides the language is
21 "reasonably susceptible" to the interpretation urged, the
22 extrinsic evidence is then admitted to aid in the second
23 step-interpreting the contract.

24 Winet v. Price, 4 Cal.App.4th 1159, 1166 (1992).

25 This threshold question regarding ambiguity is answered in
26 the affirmative by a review of the language of the Settlement
27 Agreement, a review of the extrinsic evidence offered by
28 Montgomery, and the language of the Proof of Claim itself.

 Referring to the defined terms in §2.01 - 2.05 of the
Settlement Agreement, the Trustee argues that MF08 released only
its claims against REL Noteholders for recovery of amounts *paid*
by REL and these are the MF08 Potential Avoidance Actions MF08
agreed to release. The Trustee also contends that the language in
§4.01 reserving the right to pursue "any action against any third
party, including any manager, member, insider or professional of
MF08" means that she may pursue Montgomery as he is "any third
party." She claims no extrinsic evidence is required to see the
intent of the parties and none has been provided by Montgomery
contradicting her interpretation.

1 Referring to the undisputed fact that individuals Walter and
2 Kelly Ng owned, controlled and managed REL, MF08 and TMF,
3 Montgomery argues that the *paid by REL* terminology is a
4 meaningless distinction in the context in which this settlement
5 was reached and the release was intended to cover this transfer
6 to him. He offers in support: (1) his REL investor portfolio
7 account statement in which REL takes credit for the \$150,000
8 payment TMF ostensibly made to him; (2) the REL Noteholders'
9 Committee's letter to the REL Noteholders; (3) the findings of
10 fact and conclusions of law in support of the REL Confirmation
11 Order; and (4) his Wells Fargo Bank IRA statement indicating
12 payments had come from REL. In addition, the court notes that
13 language in MF08's Proof of Claim shows that MF08 was aware that
14 TMF was used to make the allegedly fraudulent transfers at the
15 behest of the Ngs who controlled all of the related entities.
16 Docket no. 44-5, Uecker Dec., Ex. 5, (Proof of Claim ¶3 (the "Ngs
17 caused the transfer" of \$66 million, the transfers were made
18 "either directly to REL, indirectly through TMF or Bar-K, or
19 [directly] to REL's borrowers"))).

20 The court has provisionally admitted this evidence and
21 reviewed it. The court concludes that the language of the
22 Settlement Agreement is reasonably susceptible to the competing
23 interpretations offered by the parties and it is therefore
24 ambiguous.

25 **2. The Extrinsic Evidence**

26 Having found that the Settlement Agreement is ambiguous, the
27 court can admit all credible extrinsic evidence to construe it.
28 Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co., 69 Cal.2d
33, 37 (1968). Such evidence includes the circumstances
surrounding the making of the Agreement, including its object,
nature, and subject matter. The court takes judicial notice of
the extrinsic evidence requested by Montgomery.

If the extrinsic evidence is not in conflict, the resolution
of the ambiguity is a question of law. Wolf. v. Superior Court,
114 Cal.App.4th 1343, 1351 (2004); Scheenstra v. California
Dairies, Inc., 213 Cal.App.4th 370, 390 (2013) (even where

1 uncontroverted evidence allows for conflicting inferences to be
2 drawn, interpretation of contract solely a judicial function).
3 Here, the extrinsic evidence is not in conflict.

4 **3. Interpretation of the Settlement Agreement**

5 Section 8.07 of the Settlement Agreement provides that it is
6 to be governed by California law. Under California law, the court
7 interprets the Settlement Agreement using the same principles
8 applicable to the interpretation of any other contract. The goal
9 is to interpret it to give effect to the mutual intent of the
10 parties as it existed when they contracted.¹⁷ Civil Code §1636
11 (contract must be interpreted to give effect to the mutual
12 intention of the parties as it existed at the time of
13 contracting, so far as the same is ascertainable and lawful),
14 Pacific Gas & E. Co., 69 Cal.2d at 38. It is the outward
15 expression of the agreement, rather than a party's unexpressed
16 intention, which the court will enforce. Winet, 4 Cal.App.4th at
17 1165.

18 A release is the abandonment, relinquishment or giving up of
19 a right or claim to the person against whom it might have been
20 demanded or enforced. Civil Code §1541 (an obligation is
21 extinguished by a release therefrom given to the debtor by the
22 creditor); Marder v. Lopez, 450 F.3d 445 (9th Cir. 2006). In
23 general, a written release extinguishes any obligation covered by
24 the release's terms, provided it has not been obtained by fraud,
25 deception, misrepresentation, duress, or undue influence. Marder,
26 450 F.3d at 449.

27 **4. "REL Transfer" and "Paid by REL"**

28 The Trustee argues that the Settlement Agreement defines a

29 ¹⁷ The Trustee argues that Montgomery has no extrinsic
30 evidence that the parties to the Settlement Agreement intended to
31 release any REL Noteholder who was not "paid by REL." In any
32 argument about the intent of the parties, Montgomery is at a
33 distinct disadvantage. As a REL Noteholder, counsel to the REL
34 Noteholders' Committee represented him in the negotiations and he
35 is an intended beneficiary of the settlement.

1 narrow category of claims in §§2.04 - 2.06 which were released:
2 the MF08 Potential Avoidance Actions against REL Noteholders who
3 were paid by REL with the \$66 million transferred from MF08. It
4 is undisputed that the check Montgomery received was written by
5 TMF from its bank account. Based on this fact alone, the Trustee
6 claims Montgomery was not paid by REL so he is not among the
7 class of REL Noteholders covered by the release in the Settlement
8 Agreement.

9 Montgomery's interpretation of "REL Transfer" and "paid by
10 REL" in the Settlement Agreement relies, in part, on his
11 extrinsic evidence regarding the context in which the Settlement
12 Agreement was reached.

13 The extrinsic evidence is consistent on one essential point.
14 By everything he was told by REL, it is reasonable to interpret
15 the Settlement Agreement as Montgomery does. By all appearances,
16 he *had* been paid by REL and had received a REL Transfer: (1) he
17 was paid in the time period described in the Proof of Claim
18 (i.e., December 2007 - February 2009), and in the time period in
19 §2.04 of the Settlement Agreement (i.e., December 2007 - August
20 2008); and (2) his investor portfolio account statement showed
21 REL took credit for making the \$150,000 payment when it was made.

22 The REL Noteholders' Committee's communications to
23 Montgomery and the other REL Noteholders were consistent with the
24 documentation Montgomery had received from REL before any
25 controversy arose. REL Docket no. 832 (Noteholders' Committee's
26 proposed solicitation letter); Docket no. 46-2, Montgomery Dec.
27 Ex. 8 (final version of solicitation letter: "In addition, MF08
28 will release any claims it could otherwise assert against
29 Noteholders that received transfers from REL (other than
30 insiders)").

31 Finally, it is undisputed that the Ngs controlled MF08, TMF,
32 and REL and had a pattern of treating them as they wished as the
33 MF08 Proof of Claim stated - the Ngs caused the \$66 million in
34 transfers to be made, either directly or indirectly. Based on
35 this, the court concludes that Montgomery's interpretation of the
36 phrases "REL Transfer" and "paid by REL" is reasonable and the
37 Trustee's is erroneous.

1 **5. "Any Third Party"**

2 Under §4.01 of the Settlement Agreement, MF08 waived the
3 right to pursue any MF08 Potential Avoidance Actions "provided,
4 however, that this agreement shall not limit or restrict the
5 right of MF08 to bring any action against any third party,
6 including any manager, member, insider or professional of MF08."
7 The Trustee argues that this savings clause in §4.01 preserves
8 all claims other than those against REL Noteholders who were
9 "paid by REL."

10 For several reasons, the Trustee's interpretation of this
11 savings clause is erroneous. First, read literally, the
12 reservation of the right to pursue "any third party" would
13 arguably mean no one was released. That absurd reading is to be
14 avoided. Civil Code §1638.

15 Second, the undisputed objective of the Settlement Agreement
16 was (1) to resolve the issues regarding the validity and priority
17 of MF08's claim which was based on the alleged fraudulent
18 transfer of \$66 million to REL where tracing was problematic and
19 the Ngs' commingling was endemic; (2) to eliminate the REL
20 Noteholders' risk of being sued by both MF08 and REL as the
21 alleged recipients of fraudulent transfers in order to ensure
22 their support for REL's Plan; and (3) to eliminate MF08's ability
23 to impede confirmation because MF08's \$66 million claim made it
24 the largest unsecured creditor in REL's case.

25 Based on the context in which the Settlement Agreement
26 arose, the court declines to adopt the Trustee's interpretation
27 that an avoidance action against "any third party" includes a REL
28 Noteholder who was paid by MF08 or TMF. If there was an intent to
carve this group of REL Noteholders out of the release, it had to
be precisely stated before the settlement was incorporated into
REL's Plan.¹⁸ MF08 acknowledged from the start that the "Ngs
caused" every payment by any of these affiliated entities to be

26 ¹⁸ The Declaration of James A. Weissenborn in support of
27 confirmation of the REL Plan is consistent with this
28 interpretation. REL Docket no. 943, ¶39-53 (describing the
settlements implemented by the REL Plan).

1 made in a way that suited their designs and the record shows the
2 Trustee was in possession of records that would have enabled her
3 to trace this transfer before she signed the Settlement
4 Agreement. To pretend otherwise endorses a fiction - that MF08
5 had legitimate independent management.

6 The settlement between REL and MF08, with the full
7 participation of the REL Noteholders' Committee, was negotiated
8 in order to "buy peace" with all the stakeholders so REL could
9 reach a consensual confirmation of its Plan. As it was described
10 in the Motion, "the principal parties in interest in the Debtors'
11 chapter 11 cases have reached the Agreement which resolves both
12 *potential disputes regarding MF08's proof of claim ... and the*
13 *relative treatment of all unsecured claims and Noteholder claims*
14 *under the Modified Plan."* Docket no. 48, RJN Ex. 10 (Motion ¶3)
15 (emphasis added). The Trustee obtained the \$5 million
16 "enhancement" and the REL Noteholders agreed to reduce their
17 claims by 50% of what they had been paid on their REL investments
18 pre-petition.¹⁹ The REL Noteholders were led to believe their
19 risk of being sued - by MF08 and REL - as the recipients of
20 allegedly fraudulent transfers was eliminated.

21 In addition, the drafting of §4.01 is troubling. The words
22 "include" and "including" are not limiting.²⁰ Because "including"
23 does not place a limit on "any third party" why follow "any third
24 party" with the narrow list of "any manager, member, insider, or
25

26 ¹⁹ Montgomery appears to misunderstand the terms of this 50%
27 reduction. As the Motion explained it, if the plan compromise was
28 approved, the Noteholders' claims "would not be subordinated or
29 challenged, but each Noteholder's claim would be reduced by 50%
30 of any cash received after the Exchange Transaction through the
31 petition date" of REL. In theory, the allowed amount of
32 Montgomery's claim was to be reduced by 50% of the \$450,000 he
33 appears to have been repaid.

34 ²⁰ See American Sur. Co. of N.Y. v. Marotta, 287 U.S. 513
35 (1933) ("include" is generally used as a word of extension or
36 enlargement rather than one of limitation or enumeration); Fraser
37 v. Bentel, 161 Cal.390 (1911) ("includes" is not ordinarily a word
38 of limitation, but rather of enlargement); Bankruptcy Code
39 §102(3) (same).

1 professional of MF08"? See In re Coudert Bros., 487 B.R. 375, 390
2 (S.D.N.Y. 2013) (interpreting employment agreement, "may include"
3 by itself is not a limiting clause but it does not exist in
4 isolation; the following phrase "and whatever other action..." is
5 one of limitation).

6 There are several contract interpretation tools that support
7 finding that the Trustee's interpretation of "any third party" is
8 erroneous. For example, under the principle *ejusdem generis*
9 (literally, of the same kind), where specific words follow
10 general words in a contract, the general words are construed to
11 embrace only things similar in nature to those enumerated by the
12 specific words. California Farm Bureau Federation v. California
13 Wildlife Conservation Bd., 143 Cal.App.4th 173, 189 (2006) (where
14 specific words follow general words, the general words are
15 construed to embrace only things similar to the enumerated
16 specific words), Nygard, Inc. v. Uusi-Kerttula, 159 Cal.App.4th
17 1027, 1045 (2008) ("any information" construed in light of the
18 kinds of protected information enumerated in the next sentence).
19 Applying that principle here indicates that the specific class -
20 managers, members, insiders or professionals of MF08 - defines
21 the broad class - third parties. REL Noteholders are not in the
22 class of intended third parties.

23 The rule of interpretation *noscitur a sociis* (literally, it
24 is known from its associates) suggests that where "any third
25 party" is ambiguous, its meaning may be discerned from the list
26 that follows it, i.e., here it means only third parties who were
27 managers, members, insiders or professionals of MF08. California
28 Farm Bureau Federation, at 189.

29 The rule of interpretation *expressio unius est exclusio*
30 *alterius* means the expression of one thing implies the exclusion
31 of the other. Rosenthal-Zuckerman v. Epstein, Becker & Green Long
32 Term Disability Plan, 39 F.Supp.3d 1103, 1107 (C.D.Cal. 2014).
33 Application of this concept suggests that the list following "any
34 third party" illustrates the type of third party - managers,
35 members, insiders or professionals of MF08. REL Noteholders are

1 not within this type of third party.²¹

2 These interpretive rules assist the court in discerning the
3 meaning of "any action against any third party" in §4.01. Based
4 on these rules and the context for the settlement, the court
5 concludes that the Trustee's interpretation of the phrase "any
6 action against any third party, including any manager, member,
7 insider or professional of MF08" is incorrect. As a REL
8 Noteholder, Montgomery is not the type of third party the Trustee
9 may sue.

10 **6. Waiver of the Right to Pursue Unknown Claims**

11 Civil Code §1542 provides that a general release does not
12 extend to claims that are unknown or unsuspected at the time the
13 release is executed. Because MF08 waived the protection of Civil
14 Code §1542, the release in the Settlement Agreement *does apply* to
15 claims that were unknown or unsuspected at the time she signed
16 the Settlement Agreement.

17 The Trustee argues that MF08 waived the protections of Civil
18 Code §1542 only "with respect to the claims released herein" and
19 the "claims released herein" are only the claims against REL
20 Noteholders who were paid by REL. As discussed above, the court
21 finds that this distinction between "paid by REL" and "paid by
22 TMF" does not hold up.

23 But the Trustee's argument regarding Civil Code §1542 bears
24 further discussion. The Trustee says she possessed all the
25 relevant books and records, but at the time she signed the
26 Settlement Agreement, she was "not aware that funds had been
27 transferred from MF08 to TMF and then used to pay REL
28 Noteholders" because she and her counsel were "focused on
maximizing the value of MF08's claim and on the preservation and
liquidation of MF08's loan portfolio." Docket no. 54-5, Uecker

25 ²¹ A release may also be construed most strongly against the
26 party who prepared it. Sime v. Malouf, 95 Cal.App.2d 82 (1949).
27 There is nothing indicating which party prepared the Settlement
28 Agreement. It may have been drafted by REL's counsel or by the
Trustee's counsel; counsel to the REL Noteholders Committee may
have participated in the drafting.

1 Dec. ¶3, ¶16-17. This is troubling in itself as it was her duty
2 to be fully informed during the settlement negotiations and she
3 possessed the records that allowed her to be fully informed. If
4 she was aware of these transfers but did not disclose them, it
5 gives the appearance that she may not have been fully candid with
6 the other participants in the mediation. At a minimum, prudence
7 would suggest that the waiver of the protections of Civil Code
8 §1542 should have been more carefully considered than it seems to
9 have been, more carefully drafted than it was, or omitted
10 altogether.

11 The Trustee concedes that there is what she calls a
12 "boilerplate" waiver of Civil Code §1542's protections but
13 contends the §1542 waiver does not operate to release this claim
14 because "there is no language in the release purporting to
15 release unknown claims and Montgomery did not introduce any
16 evidence that the parties' intent was to release unknown claims,"
17 and there is "no language in the REL Settlement Agreement
18 releasing claims that the Trustee did not know or suspect to
19 exist" or language by which "the parties took the risk that
20 unknown or unanticipated claims might exist." Docket no. 52,
21 Opposition Memorandum at 7. She insists that what she calls the
22 "mere recital" of the §1542 waiver is not sufficient.

23 The Trustee is wrong for several reasons. First, the
24 language in the Settlement Agreement is more than a "mere
25 recital" of a Civil Code §1542 waiver. The Settlement Agreement
26 clearly acknowledges that (1) her counsel had given her advice
27 about the significance of waiving §1542, and (2) she was
28 *independently aware* of the significance of waiving its
protections for both unknown or unsuspected claims.

Second, in every place she makes this argument about the
necessity of "independent language," the Trustee quotes one
isolated sentence from Casey v. Proctor, 59 Cal.2d 97, 109
(1963):

It therefore appears beyond reasonable doubt that Civil Code
section 1542 was intended by its drafters to preclude the
application of a release to unknown claims in the absence of
a showing apart from the words of the release of an intent
to include such claims.

1 Id. at 109.²²

2 In Casey, plaintiff was involved in a car accident and
3 quickly afterwards signed a release covering property damage (for
4 which he was paid) and bodily injuries (for which he was not
5 paid); the release did not include a waiver of Civil Code §1542.
6 When plaintiff later began to suffer injuries stemming from the
7 accident, he sued to recover compensation for these injuries.
8 Defendant moved for and was given a directed verdict based on the
9 release. The directed verdict was reversed on appeal. When the
10 release was signed, neither party had reason to believe personal
11 injuries had been suffered. Plaintiff argued that the release was
12 a general release which, by operation of §1542, did not extend to
13 these unknown injuries. Defendant argued that it was a *specific*,
14 not a general release, because it referred to unknown claims so
15 plaintiff had released the personal injury claim. The court
16 explained that §1542 was not intended to prevent settlements of
17 unknown claims:

18 Its purpose was to prevent the mere recital in the release
19 to that effect from barring a claim for injuries later
20 discovered in the absence of a showing of a conscious
21 understanding that if injuries were suffered which had not
22 yet manifested themselves they too would be discharged by
23 the release.

24 Id. at 109.

25 Casey is not helpful to the Trustee for several reasons.
26 First, it is a personal injury case, a context with its own set
27 of policy concerns lacking here. Brae Transp. Inc. v. Coopers &
28 Lybrand, 790 F.2d 1439, 1445 (9th Cir. 1986) (declining to apply
rationale of personal injury cases to commercial case). Second,
as explained in Winet v. Price, 4 Cal.App.4th 1159, 1174, n.7

24 ²² She goes so far as to say there is a "Casey rule." Docket
25 no. 61, Reply Memorandum at 10. As discussed in Winet v. Price,
26 the California Supreme Court's Pacific Gas & Electric decision
27 shows Casey has questionable precedential value. Winet, 4
28 Cal.App.4th 1159, 1174 n. 7 (1992). The notion that there is a
"Casey rule" is a pointless embellishment that comes very close
to being a misleading suggestion regarding the current state of
the law.

1 (1992):

2 To the extent Casey holds we must ignore the language of the
3 release and examine only extrinsic evidence in evaluating
4 the parties intent, Casey would be inconsistent with the
5 Pacific Gas & E. Co. admonition that the contractual
language is the source of the parties' rights and duties,
and that extrinsic evidence is examined only to construe any
ambiguities extant in the language.

6 Id. at 1174, n. 7.

7 Third, the Settlement Agreement *does* indicate a conscious
8 understanding that there may be other claims. The settlement was
9 in significant part predicated on the difficulty and expense of
10 tracing the transfers made by the Ng family members by and among
11 their wholly owned entities. The presence of this tracing issue
12 itself indicates a conscious understanding - apart from the words
of the release in §4.01 - that there was a risk that unknown or
unsuspected claims might exist.

13 Finally, the Trustee argues that the §1542 waiver is limited
14 to "the claims released herein" - by which she means the REL
15 Transfers and the MF08 Potential Avoidance Actions but nothing
16 else. She is correct that a §1542 waiver may be limited to
17 specific claims or circumstances. See Butler v. Vons Companies,
18 Inc., 140 Cal.App.4th 943 (2006) (contract ambiguous as to
19 whether employee only released labor grievance claims and not
20 employment discrimination claims so that §1542 waiver may not
21 apply to discrimination claim); Asare v. Hartford Fire Inc. Co.,
22 1 Cal.App.4th 856 (1991) (release of workers compensation claim
23 did not apply to discrimination claim); Integrated Global
24 Concepts, Inc. v. J2 Global, Inc., 2014 WL 1230910 (N.D. Cal.
25 March 21, 2014) (waiver of §1542 was limited by language to
26 specific claims predating the agreement).

27 The weakness in this argument is that the claim against
28 Montgomery is the same *type of avoidance claim* that the Trustee
released - the only difference is that his IRA received \$150,000
from a bank account in the name of TMF, MF08's only member and
manager. Unlike the distinction in Butler, where the question was
about a labor grievance claim and an employment discrimination
claim, or the issue in Asare, where the question was about a

1 workers compensation claim and an employment discrimination
2 claim, the distinction between an an avoidance action against an
3 REL Noteholder "paid by REL" and one "paid by TMF," ostensibly
4 acting on behalf of REL, is too thin to hold up. See Brae
5 Transportation, Inc. v. Coopers & Lybrand, 790 F.2d 1439 (9th
6 Cir. 1986) (release covered claims regarding net worth, release
7 was general as to this "type of claim").

8 Most problematic for the Trustee is her misplaced reliance
9 on Winet v. Price, 4 Cal.App.4th 1159 (1992). In Winet, an
10 attorney and his former client entered into an agreement
11 releasing all claims against the attorney including unknown and
12 unsuspected claims, and waiving the benefit of Civil Code §1542.
13 Years later the client sued the attorney. The trial court granted
14 summary judgment for the attorney on the theory that the release
15 covered all claims being asserted by the former client.

16 The appellate court agreed. First, the unambiguous language
17 of the agreement released all claims, known or unknown. Second,
18 the client's proffered testimony - his uncommunicated subjective
19 intent that he did not intend to release a later discovered claim
20 - was parol evidence that was inadmissible because it
21 contradicted the agreement and the agreement was not reasonably
22 susceptible to the client's interpretation. Third, the
23 circumstances surrounding the adoption of the release suggested
24 that the client did in fact intend to release unknown claims.

25 The court explained that the client's evidence of his
26 subjective intent was not admissible because it:

27 seeks to prove that a release of unknown or unsuspected
28 claims was not intended to include unknown or unsuspected
claims. If an argument such as this were given currency, a
release could never effectively encompass unknown claims. A
releasor would simply argue that a release of unknown or
unsuspected claims applied only to known or suspected
claims, making it ineffective as to unknown or unsuspected
claims.

29 Id. at 1167 (emphasis in original).

30 This is precisely the problem with the Trustee's argument
31 regarding MF08's waiver of the protections of Civil Code §1542.
32 She admits she possessed all the MF08 and TMF bank records at the

1 time she negotiated the Settlement Agreement and then declares
2 she was not aware of the transfer that went from MF08 to TMF to
3 Montgomery. In effect, she says that she did not intend to waive
4 this unknown or unsuspected claim because she did not know of it
5 or suspect she had it. Because she apparently belatedly
6 discovered that she could trace funds from MF08 to TMF to
7 Montgomery, she claims she can escape the fact that she waived
8 the right to pursue unknown claims. In the context of this case,
9 especially where the inability to trace was one of the underlying
10 predicates for the Settlement Agreement, she cannot escape the
11 conclusion that MF08's waiver the protection of Civil Code §1542
12 prevents her from pursuing recovery from Montgomery.

11 **IV. Conclusion**

12 For the reasons explained above, the court grants summary
13 adjudication in favor of Montgomery. The Settlement Agreement is
14 ambiguous and the extrinsic evidence shows that the release in
15 the Settlement Agreement covers the Trustee's claims in this
16 adversary proceeding. The remaining issues are moot.

17 * * * End of Memorandum Decision * * *

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2 Court Service List
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4 Parties by ECF
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